89- 1458

Supreme Court, U.S.
FILED
MAR 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MANNHEIM VIDEO, INC.,
an Illinois Corporation,

Petitioner,

vs.

COUNTY OF COOK, a Body
Politic and Corporate,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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March 14, 1990

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QUESTIONS PRESENTED

1. May a government agency insist upon *Younger* abstention after it has chosen to submit substantive issues to the federal trial court and after it has obtained an indication that that court may be inclined to rule against its position on those issues?

2. Does a trial court's disposition of a motion to dismiss, reaching the legal merits of the claims asserted in the complaint, constitute substantial proceedings on the merits so as to preclude subsequent *Younger* abstention?

3. May a federal trial court finally and preclusively decide state law issues before abstaining from determining federal constitutional issues under *Younger v. Harris*?

PARTIES

The parties to the proceedings below were Mannheim Video, Inc., the Plaintiff in the District Court and the Appellant in the Court of Appeals, and the County of Cook, the Defendant at trial and the Appellee on Appeal. While the Petitioner, Mannheim Video, Inc., is an Illinois corporation, it has no parent, subsidiary, or affiliate companies. The Respondent is a governmental body politic and corporate under the constitution and laws of Illinois.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 884 F.2d 1043 (7th Cir. 1989) and is reprinted in the appendix to this petition at page 1a.

The opinions and orders of the United States District Court for the Northern District of Illinois have not been reported and are reprinted in the appendix to this petition beginning at 11a.

JURISDICTION

The District Court had jurisdiction over this action under Title 28, United States Code, sections 1331 and 1343 because this case arises under the first and fourteenth amendments to the Constitution of the United States and under Title 42, United States Code, section 1983. On November 28, 1988, the District Court, *sua sponte*, dismissed this action on *Younger* abstention grounds. *See infra* at 11a. The Petitioner filed a post-trial motion but withdrew it without a ruling by the District Court.

The Court of Appeals had jurisdiction over this appeal under Title 28, United States Code, section 1291 because the Petitioner sought review and reversal of the November 28 final judgment of the District Court. The notice of appeal was filed on December 27, 1988. On September 20, 1989, the Court of Appeals affirmed the District Court's dismissal, *see infra* at 9a, and it denied the Petitioner's request for rehearing on November 14, 1989, *see infra* at 10a.

On February 5, 1990, Justice Stevens ordered that the time for filing this petition for a writ of certiorari be extended to and including March 14, 1990. This Court has jurisdiction to review the judgment of the Court of Appeals under Title 28, United States Code, section 1254(1).

STATUTES INVOLVED

No federal, state, or local statutes, ordinances, or court rules are directly involved in this appeal because the issues concern the propriety of the District Court's abstention under a doctrine developed and articulated by this Court.

STATEMENT OF THE CASE

Mannheim Video, Inc. ("Mannheim"), the Petitioner here, filed this action in the United States District Court for the Northern District of Illinois on May 2, 1988, asserting claims under the first and fourteenth amendments to the United States Constitution and under section 1983 of Title 42 of the United States Code. The trial court had jurisdiction over these claims under sections 1331 and 1343 of Title 28. The complaint sought declaratory and injunctive relief against the County of Cook ("County"), the Respondent here, on three separate grounds. In count I, Mannheim asserted that the store and video arcade which it owns and operates in unincorporated Cook County was not an "adult regulated use" or an "adult bookstore" as those terms are defined in the adult use provisions of the County's Zoning Ordinance, as amended. Mannheim also asserted that the definition of "adult bookstore" contained in that ordinance was unconstitutionally vague because it classified any bookstore as an "adult bookstore" if "a substantial or significant portion of its stock in trade [consists of] books, magazines and other periodicals which are

distinguished or characterized by their emphasis on" nudity or sexual activities as defined in the ordinance. *See infra* at 2a, 18a-19a. While Mannheim stocks some sexually explicit but non-obscene written materials, they amount to less than half of its stock in trade. *See infra* at 1a, 18a.

In count II of its complaint, Mannheim asserted that the booths in its video arcade were not "adult motion picture theaters" or "adult mini motion picture theaters" within the meaning of the ordinance because they could not properly be characterized as theaters at all. *See infra* at 2a, 22a. Finally, Mannheim asserted in count III that the entire adult use ordinance was unconstitutional because it impermissibly banished adult uses to unincorporated Cook County's industrial zones, thereby failing to permit the reasonable alternatives for Mannheim's communication required by the first and fourteenth amendments to the Constitution of the United States. *See infra* at 2a, 23a. At the time Mannheim filed its complaint, the Illinois Supreme Court had rejected this last claim in a state court lawsuit brought by unrelated parties, and the matter was pending before this Court, which eventually dismissed that appeal for want of a substantial federal question. *See infra* at 2a, 24a. Mannheim filed its complaint because, as a result of previous efforts by the County to enforce its ordinance against businesses similar to its own, Mannheim genuinely feared that the County would attempt to apply and enforce its ordinance to require that Mannheim close its store and video arcade.[1]

[1] In fact, the County had already filed a state court building code action against Mannheim in the Circuit Court of Cook County, Illinois, although the suit did *not* implicate the adult use provisions of the ordinance in any way. *See infra* at 2a. The County, however, made no serious effort to advance the state court matter for trial.

On or about July 5, 1988, the County responded to Mannheim's District Court complaint by moving, pursuant to rule 12(b)(6) to dismiss each count on the grounds that each failed to state a claim for which Mannheim could obtain relief. *See infra* at 2a, 17a. In its memorandum supporting its motion to dismiss, the County asserted, *inter alia*, that other federal courts had considered, and upheld against facial vagueness attacks, language identical to that challenged in count I of Mannheim's complaint. *See infra* at 20a-21a. The County also asserted that count II failed to state a claim because, the County suggested, the complaint's own description of the booths in Mannheim's video arcade plainly indicated that the booths fell within the statutory definition of an "adult mini motion picture theater" or an "adult motion picture theater." *See infra* at 22a. Finally, the County noted that count III challenged the validity of the locational restrictions contained in the ordinance on grounds identical to those advanced in a state lawsuit, mentioned *supra*, which had been decided by the Illinois Supreme Court and was then pending on appeal before this Court. *See infra* at 23a-24a.

On September 20, 1988, the trial court issued a minute order in which it indicated that count I of Mannheim's complaint stated a proper claim and would proceed, that count II would be dismissed for failure to state a claim, and that a decision regarding count III would be stayed pending final resolution of the state court case involving unrelated parties then pending before this Court on review. *See infra* at 16a. In an accompanying memorandum order, the trial court rejected the County's objections regarding Mannheim's standing to challenge the ordinance. The memorandum also concluded that Mannheim had "stated a cognizable claim for relief based on vagueness grounds," and it therefore denied the County's motion to

dismiss count I. *See infra* at 22a. The memorandum, however, agreed with the County's suggestions regarding count II and granted the motion to dismiss that count. *Id.* With respect to count III, the memorandum rejected the County's assertions that the recent Illinois Supreme Court decision precluded Mannheim's challenge or bound the District Court, but noted that the this Court's disposition of that case on review would control the District Court's decision on the County's motion to dismiss the challenge presented in count III. *See infra* at 24a. The memorandum thus stayed action on the motion to dismiss that count. This Court summarily dismissed the appeal from the Illinois Supreme Court on October 11, 1988, *see infra* at 3a, but the trial court never took any further action regarding the County's motion to dismiss count III. Neither the September 20 minute order nor the accompanying memorandum order disposed of all of Mannheim's claims in the District Court, and neither directed entry of judgment or contained any findings concerning immediate enforcement or appeal under rule 54(b).

On October 27, 1988, after federal trial judge had ruled on the County's motion to dismiss Mannheim's District Court complaint, the County filed a second amended complaint in the dormant state court action, *see* n. 1, *supra*, then pending against Mannheim. *See infra* at 3a. That second amended complaint entirely abandoned all of the claims which the County had previously advanced in that action and replaced them with precisely what Mannheim had anticipated in its federal action: a claim that Mannheim was operating its store and video arcade as an "adult use" in violation of the adult use provisions of the zoning ordinance. *Id.* On November 10, Mannheim responded to the County's second amended state court complaint by seeking an injunction in the District Court restraining the

County from advancing its new claims in the state court and requiring the County to continue to contest Mannheim's constitutional claims in the District Court, if at all. As required by state court rules, Mannheim also answered the County's second amended state court complaint and asserted a state court counterclaim on November 20, 1988. *Id.* Upon learning that the essential claims at issue in this action had been introduced into the state court as a result of the County's second amended state court complaint, the District Court issued a minute order on November 28, 1988 stating in pertinent part that, "[o]n the Court's own motion, cause is dismissed on grounds of Younger abstention." *See infra* at 12a. This order further directed "[j]udgment to enter dismissing the action." On the same day, the Clerk of the United States District Court for the Northern District of Illinois entered a final judgment which established that "IT IS ORDERED AND ADJUDGED that cause is dismissed on grounds of Younger abstention." *See infra* at 11a.

On December 27, 1988, Mannheim appealed from that judgment to the United States Court of Appeals for the Seventh Circuit, suggesting that the District Court's September 20 disposition of the County's motion to dismiss constituted substantial proceedings on the merits which preceded the injection of any federal issue into the state court proceeding pending between the parties and which therefore precluded the District Court's November 28 abstention under *Younger v. Harris*, 401 U.S. 37 (1971). Mannheim also complained that, as a result of the District Court's abstention, the County would be afforded an unwarranted second opportunity to litigate, before a state court, the constitutional vagueness issue which, Mannheim asserted, it had already effectively lost in the federal court. On September 20, 1989, the Court of Appeals af-

firmed the District Court's dismissal on *Younger* abstention grounds. *See infra* at 9a. It rejected the contention that the District Court had reached the merits of Mannheim's claims in disposing of the County's motion to dismiss the complaint. Instead, the Court of Appeals concluded that the District Court had merely measured Mannheim's complaint against the liberal test for legal validity articulated in *Conley v. Gibson*, 355 U.S. 41 (1957), *see infra* at 6a, and it likened that action to a determination of jurisdictional standing issues, which it had previously held would not bar *Younger* abstention, *see infra* at 4a-5a. At the same time, the Court of Appeals also affirmed an unrelated District Court ruling which the County had challenged on a cross-appeal. *See infra* at 6a-9a. The Court of Appeals denied Mannheim's request for a panel rehearing on November 14, 1989.

REASONS FOR GRANTING THE WRIT

I.

A Government Agency May Not Insist Upon *Younger* Abstention After It Has Chosen To Submit Substantive Issues To The Federal Trial Court And After It Has Obtained An Indication That That Court May Be Inclined To Rule Against Its Position On Those Issues.

Since the County waited until after the District Court had indicated that it might be inclined to invalidate a portion of the County's adult use provisions on the vagueness grounds urged by Mannheim, *see infra* at 22a, before even obliquely suggesting that that court should abstain under the doctrine articulated in *Younger v. Harris*, 401

U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971), and their progeny, the County effectively waived its right to any such abstention. Unlike the abstention called for under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), *Younger* abstention is designed to protect the interests of state parties and state systems in using state courts to adjudicate, in the first instance, those federal constitutional challenges which arise from the application or enforcement of state or local legislation. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477, 479-80 (1977). For this reason, "[i]f the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Id.* at 480. While this Court has previously considered only express waivers of Younger abstention claims,[2] *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 626 (1986); *Brown v. Hotel Employees*, 468 U.S. 491, 500 n. 9 (1984); *Hodory*, 431 U.S. at 480, this case presents a waiver by estoppel—after first deliberately submitting its arguments to the federal trial court, the County was thereafter precluded from insisting, on *Younger* or any other grounds, upon a second opportunity to litigate those issues before a different judge in state court.

The County plainly could have filed state court proceedings directed to enforcing its adult use provisions after it was served with Mannheim's federal complaint but before any proceedings of substance had taken place on the merits in the federal action. *See Hicks v. Miranda*, 422 U.S. 322, 349 (1975). Indeed, it had over four and one-

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[2] *But see Granberry v. Greer*, 481 U.S. 129 (1987) (government's failure to raise state exhaustion requirement at outset of federal habeas corpus proceedings may constitute waiver).

half months in which to do so before the District Court first considered the parties' claims on the County's motion to dismiss. *See supra* at 3, 5; *cf. Hicks* at 357 (Stewart, J., dissenting) ("The Court's new rule creates a reality which few state prosecutors can be expected to ignore. It is an open invitation to state officials to institute state proceedings in order to defeat federal jurisdiction."). Instead of proceeding in state court, however, the County expressly raised the merits of Mannheim's constitutional challenges in the federal forum by moving to dismiss the federal complaint for failure to state a claim.

When the District Court resolved the County's motion, it concluded that Mannheim had "stated a cognizable claim for relief based on vagueness grounds." *See infra* at 22a. It thus became apparent that the District Court was seriously considering invalidating an important part of the County's ordinance on its face because it was unconstitutionally vague. Because such a ruling would have very seriously interfered with the County's efforts to regulate adult uses, the County may have decided to take its chances with a new judge; if so, it found in the *Younger* abstention doctrine an apparently ideal opportunity to do so. Whether or not the County actually sought to engage in such mid-litigation informed forum shopping—so plainly wasteful of judicial resources—the District Court's abstention after it had carefully considered the County's legal response to Mannheim's claims establishes a policy which would invite government parties to "test the waters" in federal court and then to insist upon *Younger* abstention if they find unfavorable indications there. Not only would such a policy waste the resources of both the state and federal courts, it would lead to an unwarranted asymmetry under the *Younger* doctrine by permitting state officials but not constitutional claimants to transfer a case

to another court and another judge if they are not satisfied with the federal court's disposition of a substantive motion to dismiss.

The courts below apparently accepted, without any formal finding of fact on the record, the County's explanation that it had been reluctant to proceed with an enforcement action in state court while this Court was reviewing the Illinois Supreme Court's decision in *County of Cook v. Renaissance Arcade and Bookstore*, 122 Ill. 2d 123, 522 N.E.2d 73 (1988), *aff'd sub nom. Mannheim Books, Inc. v. County of Cook*, 109 S.Ct. 209-10 (1988) (appeal dismissed for want of substantial federal question), which had upheld the general constitutionality of the County's zoning ordinance. *See infra* at 2a, 14a. Apart from the fact that the County had *prevailed* in the Illinois Supreme Court, and thus remained free to pursue its state enforcement action at all times material, the County has never explained why it was reluctant to proceed in state court when it never sought a stay of any sort in the federal proceeding. Unlike its motion to dismiss, such a motion to stay would have immediately signaled the County's supposed federalism concerns, would have avoided the expenditure of federal judicial resources by the District Court, and would have eliminated the estoppel concerns expressed here. If the County preferred to await this Court's review of the *Renaissance* decision before proceeding with Mannheim's challenges, it should not have voluntarily proceeded in the District Court. When it filed and briefed its motion to dismiss Mannheim's complaint for failure to state a claim, however, and especially when it waited for the trial court to decide its motion before saying or doing *anything* which even remotely suggested that it might prefer a state forum, the County effectively waived whatever right it would otherwise have had under *Younger* to pro-

ceed in the state court. It was therefore improper for the trial court to abstain, either *sua sponte* or at the County's request, from continuing to exercise its jurisdiction over Mannheim's constitutional challenges.

Although it had never before determined whether a governmental party could waive its right to *Younger* abstention by silently proceeding in the federal courts, *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091, 1094-95 (7th Cir. 1984), *cert. den'd* 469 U.S. 817 (1985), the Court of Appeals rejected Mannheim's claim that the County had done so here by failing to insist upon such abstention before presenting its contentions in the federal forum. In so doing, the court below apparently departed from the waiver rules which some of its sister circuits apply under the *Younger* doctrine. *See, e.g., Association of Community Organizations for Reform Now v. Municipality of Golden*, 744 F.2d 739, 742-43 n. 2 (10th Cir. 1984) (government "voluntarily submitted to a federal forum" by "voluntarily stay[ing] [state court] criminal proceedings . . . pending resolution of the ordinance's validity in federal court"); *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978) (government waived *Younger* abstention claim by failing to raise it before district court) *aff'd* 445 U.S. 308 (1980). The resulting conflict among the circuits warrants resolution by this Court. *Cf.* S.Ct. Rule 10.1(a).

II.

A Trial Court's Disposition Of A Motion To Dismiss, Reaching The Legal Merits Of The Claims Asserted In The Complaint, Constitutes Substantial Proceedings On The Merits So As To Preclude Subsequent *Younger* Abstention.

The Court of Appeals erroneously concluded that the District Court proceedings remained "in an embryonic stage," *see infra* at 6a, *quoting Ciotti v. County of Cook*,

712 F.2d 312, 314 (7th Cir. 1983), at the time the District Court decided *sua sponte* to abstain under the principles articulated in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. In fact, the litigation had advanced well beyond an "embryonic" stage by the time the District Court abstained on November 28, 1988. Two months earlier, the District Court had resolved the County's motion to dismiss Mannheim's federal complaint in a manner which plainly reached and considered the merits of each of Mannheim's claims. This Court has not yet determined the circumstances under which a trial court's resolution of a motion to dismiss under civil rule 12(b)(6) might constitute "proceedings of substance on the merits," *cf. Hicks v. Miranda*, 422 U.S. 332, 349 (1975), so as to preclude subsequent *Younger* abstention. It has held, however, that the partial grant of a preliminary injunction does constitute such a proceeding, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238 (1984) (also leaving open whether issuance of temporary restraining order would alone bar subsequent *Younger* abstention); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31 (1975) (federal plaintiffs who had obtained preliminary injunction could defeat government's *Younger* abstention claim), and it has implicitly indicated that the denial of a temporary restraining order ordinarily does not, *Id.* at 925, 929 (federal plaintiff against whom state court proceedings were initiated immediately following denial of temporary restraining order could not defeat *Younger* abstention claim).[3] In particular, this

[3] Beyond this, this Court has noted in general that "federal courts have a virtually unflagging obligation to exercise their jurisdiction except in those extraordinary circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-15 (1983); *quoting County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959).

Court has articulated two presumably equivalent tests for determining when Younger abstention is timely: when "state . . . proceedings are begun against the federal plaintiff . . . before proceedings of substance on the merits have taken place in the federal court," *Hicks*, at 349, and when state proceedings commence while "the federal litigation [is] in an embryonic stage and no contested matter ha[s] been decided," *Doran*, at 929. Finally, this Court has also made clear that when an abstention claim comes too late under these tests, "considerations of economy, equity, and federalism counsel against *Younger* abstention . . ." *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 238.

Thus a federal court faced with an abstention claim arising after it has determined a motion to dismiss for failure to state a claim must carefully examine its own actions in resolving that motion in order to determine if it reached the merits in any substantial way. Yet in affirming the District Court's abstention below, the Court of Appeals altogether failed to closely evaluate the District Court's September 20 resolution of the County's motion to dismiss. In so doing, the Court of Appeals essentially held that no rule 12(b)(6) motion could ever constitute such proceedings because the ultimate test under that rule reflects the liberal pleading standards established by the Federal Rules of Civil Procedure. *See infra* at 6a, *quoting Conley v. Gibson*, 355 U.S. 41 (1957). To be sure, *some* motions to dismiss a complaint for failure to state a claim merely raise technical pleading defects or other threshold matters; but others directly and effectively challenge the validity of the central legal theories presented in the complaint. The resolution of the latter sort of motion to dismiss calls for a detailed and sensitive inquiry into the law applied to the circumstances alleged in the complaint.

Furthermore, where the essential facts are not disputed in a proceeding, a resolution of the latter sort of motion to dismiss will essentially decide the case. A decision on *this* sort of motion to dismiss thus plainly advances the litigation beyond an "embryonic stage" and decides "contested matter[s]." *Cf. Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (1975). It also requires a substantial investment of the federal court's resources, time, and attention, and thus constitutes a proceeding of substance on the merits which bars subsequent *Younger* abstention. *Hicks v. Miranda*, 422 U.S. 322, 349 (1975).

In resolving the County's motion to dismiss, the District Court below took just this sort of action. It considered and evaluated the substantive law concerning the vagueness of the "substantial or significant portion" language challenged in count I of Mannheim's complaint. Although it began its discussion by reciting the liberal pleading standards articulated in *Conley v. Gibson*, 355 U.S. 41 (1957), and by passing on the County's challenge to Mannheim's standing to sue, *see infra* at 17a-20a, it went on to evaluate the central legal claim presented in count I. The District Court, for instance, expressly noted that the County "also challenge[d] the *merits* of the plaintiff's vagueness claim." *See infra* at 20a (emphasis added). It then turned to a careful consideration of the precedents relating to Mannheim's substantive vagueness claim. *See infra* at 20a-22a. None of these cases arose on a motion to dismiss a complaint. *See Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980) (affirming in relevant part a permanent injunction entered by trial court); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979) (reversing two trial court decisions, at least one of which was entered after hearing and upon parties stipulation for a decision on the merits); *Pensack v. City and County*

of Denver, 630 F.Supp. 177 (D. Colo. 1986) (deciding liability after portion of bifurcated trial on that issue); *15192 Thirteen Mile Road v. City of Warren*, 626 F. Supp. 803 (E.D. Mich. 1984) (issuing decision after two hearings for preliminary injunction and four weeks of hearing on the merits); *Nortown Theatre, Inc. v. Gribbs*, 373 F.Supp. 363 (E.D. Mich. 1974) (granting defendants' motion for summary judgment on merits), *aff'd sub nom. Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Each of the cases which the District Court considered was plainly addressed to matters well beyond the minimum pleading standards applicable under civil rule 12(b)(6). Nothing in this portion of the District Court's discussion indicates that it was restricted to anything short of reaching and resolving the substantive legal issues raised by count I of Mannheim's complaint. *See infra* at 20a-22a. Thus when the District Court concluded that the "plaintiff has stated a cognizable claim for relief based on vagueness . . . ," *see infra* at 22a, it did so after reviewing, assessing, and deciding the substantive law applying to the issue. This required a considerable investment of the District Court's attention, and advanced the proceedings concerning count I well beyond anything which could be termed an "embryonic stage." The Court of Appeals should therefore have concluded that the District Court's resolution of the County's motion to dismiss amounted to a substantial proceeding on the merits within the meaning of *Hicks v. Miranda*, 422 U.S. 322, 349 (1975).

Given the purely legal character of the sort of facial vagueness challenge which Mannheim asserted in count I, the District Court's evaluation of the County's objections and defenses to that challenge reached virtually all of the issues which could have been contested in connection with that challenge. Indeed, the September 20 decision left

little else for the District Court to do on count I but enter final judgment for Mannheim at the appropriate time. Because there were no essential factual issues to resolve in adjudicating the vagueness claim, there was no need for discovery, summary judgment, or trial. When the County filed its answer to count I of Mannheim's complaint following the District Court's denial of its motion to dismiss that count, for instance, it did not seek to place any central facts in dispute. It did continue to contend that the "substantial or significant portion" language contained in its ordinance was not unconstitutionally vague, but after the trial court's resolution of the County's motion to dismiss count I, *see infra* at 20a-22a, there could be little doubt that the court would reject that contention.[4] Indeed, the County's answer indicates that, apart from its reassertion of legal arguments which the trial court had

[4] In opposing rehearing below, the County advanced the suggestion that the District Court might have changed its mind when *City of Chicago v. Scandia Books, Inc.*, 102 Ill. App. 3d 292, 430 N.E.2d 14 (1st Dist. 1981), was brought to its attention. Yet the possibility that a court might alter its resolution of a contested legal issue is also present after issuance of a preliminary injunction, but that fact does render such issuance any less a proceeding of substance on the merits. *Cf. Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238 (1984). Beyond this, it is highly unlikely that *Scandia* would have altered the District Court's conclusion. It vagueness analysis draws upon cases far removed from a first amendment context. *Scandia*, at 297, 430 N.E.2d at 19. The court had already criticized this problem in other cases. *See infra* at 21a. The court had also already properly determined that it was not bound by a state court resolution of a federal constitutional issue. *See infra* at 23a. Finally, *Scandia* most probably would have convinced the District Court that the state courts had already failed and refused to impose any sort of narrowing state court construction on the language in question, *cf. Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). This realization would most likely have reinforced the District Court's conclusions concerning the substantiality of Mannheim's vagueness challenge.

already rejected, the County disputed only minor, ancillary factual issues, in most cases because it lacked sufficient information to admit or deny certain incidental allegations in the complaint. *See, e.g.*, R. Item 14 at 4, 5. Such ancillary factual matters could, if necessary, easily have been brought to final judgment at the appropriate time by a motion under civil rule 56 supported by affidavits establishing the unadmitted ancillary facts. Thus the posture of count I after the County filed its answer plainly demonstrates that the District Court had reached and resolved the single major issue raised by Mannheim under that count: the legal issue concerning the facial vagueness of the County's "substantial or significant portion" language. Where, as here, the resolution of a motion to dismiss for failure to state a claim thus disposes of the central issue raised by a count of a complaint, that resolution amounts to a "proceeding[ ] of substance on the merits" which should preclude subsequent *Younger* abstention under *Hicks v. Miranda*, 422 U.S. 322, 349 (1975).

Even the District Court's resolution of the County's motion to dismiss count II of Mannheim's complaint should have precluded its subsequent abstention. While the Appellate Court's determination on that issue, *see infra* at 5a-6a n. 3, does have some surface appeal, it ignores the fact that the County freely *chose* to submit that claim, along with the others, to the federal court for resolution. The fact that a federal plaintiff has advanced a weak or even frivolous claim in no way requires the state defendants to submit that claim to the federal court. It can instead immediately seek abstention and move in the state court to strike or dismiss similar defense or counterclaim which might be presented there. By moving to dismiss count II in the District Court, the County forced that court to commit its resources to resolving the issue, how-

ever quickly or easily that resolution might have come. Furthermore, had it not subsequently abstained, *see infra* at 12a, the District Court's September 20 dismissal would have essentially disposed of the precise claim asserted in count II. The District Court's action regarding count II therefore also substantially advanced the litigation on its merits and thus should have barred subsequent abstention under *Younger*.

For the foregoing reasons, it would elevate procedural form over substance to assume with the Court of Appeals below that all rule 12(b)(6) motions to dismiss merely measure a complaint against the pleading standards articulated in such cases as *Conley v. Gibson*, 355 U.S. 41 (1957). Rather, the test which this Court has already developed to govern the timing of *Younger* abstention call for a more sensitive analysis. No *per se* rule can be formulated under *Younger* and its progeny concerning motions to dismiss for failure to state a claim and their effect upon subsequent abstention requests. This Court should, however, instruct the lower courts to apply the established tests to each particular situation with careful attention to the history of the federal litigation and a realistic appraisal of what it has accomplished. As this Court has not recently reviewed and applied the tests governing the timing of *Younger* abstention, this case presents an opportunity to provide continuing guidance to the lower courts on the important questions which arise as the federal courts attempt to strike the proper balance between federalism concerns and the need for efficiency and finality in the litigation process. *Cf.* S.Ct. Rule 10.1(c).

III.

A Federal Trial Court May Not Finally And Preclusively Decide State Law Issues Before Abstaining From Determining Federal Constitutional Issues Under *Younger v. Harris*.

Even if the Court of Appeals had been correct in determining that the District Court properly abstained under *Younger v. Harris*, 401 U.S. 37 (1971), in deference to the state court proceedings into which the County had injected the relevant federal issues after the District Court had disposed of its motion to dismiss Mannheim's federal complaint, the Court of Appeal's published decision fails to properly limit and clarify the scope and effect of abstention under the *Younger* doctrine. Because such abstention is designed to serve the interests of state parties and state systems in using state courts to adjudicate, in the first instance, those federal constitutional challenges which arise from the application or enforcement of state or local legislation, *see Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477-80 (1977), any such abstention should reach all portions of a federal case which are open to adjudication in the parallel state court proceeding. *Cf. Deakins v. Monaghan*, 484 U.S. 193 (1988) (*Younger* abstention not appropriate for issues which cannot be litigated in state forum). Such abstention should also leave the state court as free as possible to resolve all of the issues presented to it in such a manner as it deems appropriate.

Some of the language contained in the Court of Appeals' opinion, however, suggests the contrary. In the course of recounting the procedural history of this case in the District Court, the Court of Appeals' opinion contains language which might be interpreted to state that the District Court had finally and preclusively resolved two of the claims which Mannheim had presented there and that

it abstained only with respect to Mannheim's facial vagueness challenge to the County's adult use ordinance. Referring to the District Court's September 20, 1988 action, for instance, the Court of Appeals commented that "Judge Marshall dismissed the second count [of Mannheim's federal complaint], finding that Mannheim's video booths fell squarely within the ordinance's definition of a mini theatre." *See infra* at 2a. It nowhere noted, however, that the September 20 order was interlocutory in character and remained "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b). The Court of Appeals also stated that "[t]he [United States Supreme Court's] dismissal in *Mannheim Books* automatically resulted in the dismissal of the third count in the present complaint which had been stayed until then." *See infra* at 3a n. 1. It nowhere suggested precisely how any decision of this Court could have "automatically" disposed of a claim pending before a trial court as part of a separate case, and it failed to note that the District Court never itself returned to count III of Mannheim's complaint on its merits after this Court's summary dismissal of the similar claims presented in *Mannheim Books*.

Based upon this recapitulation of the District Court proceedings, the Court of Appeals indicated that "all that remained of Mannheim's suit [by November, 1988] was a single count alleging that the term 'substantial and significant portion' was unconstitutionally vague." *See infra* at 3a. This language might lead a state court which is unfamiliar with the details of federal practice to conclude that the District Court had finally and preclusively disposed of the claims raised in counts II and III of Mannheim's federal complaint on their merits before it ab-

stained under *Younger v. Harris*, 401 U.S. 37 (1971). Such an inference might be further bolstered by the Court of Appeals' additional passing comments that count II was "no longer a part of the case," and that "only the first count remained" when the trial court considered abstention *sua sponte* in November, 1988. *See infra* at 6a n. 3. Finally, the Court of Appeals' comment that the trial court's denial of the County's motion to dismiss count I had no *res judicata* effect, *see infra* at 6a n. 4, could very likely lead the state court to conclude that the trial court's actions concerning the other counts did indeed have *res judicata* effects.

These suggestions advanced by the Court of Appeals are, however, inconsistent with the principles underlying the *Younger* abstention doctrine as well as with the Federal Rules of Civil Procedure. As noted *supra*, rule 54(b) expressly provides that interlocutory orders such as the District Court's September 20, 1988 resolution of the County's motion to dismiss remain subject to revision by the trial court at any time before the entry of final judgment. In this case, the final judgment below did in fact displace the District Court's earlier consideration of the merits of Mannheim's claims,[5] declaring that "IT IS ORDERED AND ADJUDGED that cause is dismissed on grounds of Younger abstention." *See infra* at 11a; *see also id.* 12a (containing virtually identical operative language and directing entry of judgment). Since the Illinois

[5] Since federal court action well short of entry of a final and binding judgment can amount to substantial proceedings on the merits precluding subsequent *Younger* abstention, *see, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), there is nothing inconsistent between Mannheim's argument in the alternative here and its principal arguments advanced under questions I and II *supra*.

court rules contain no express language equivalent to that cited *supra* from rule 54(b), however, *see, e.g.*, Illinois Supreme Court Rule 308, Ill. Rev. Stat. ch. 110A, para. 308 (closest state equivalent to federal rule 54(b)), the state court which will adjudicate Mannheim's claims if the District Court's *sua sponte* abstention stands may not realize that all of the claims which Mannheim had advanced in the District Court remain open for resolution in that court.[6]

Perhaps more important than the Court of Appeals' failure to frame language that is consistent with the Federal Rules of Civil Procedure, is that court's failure to recognize that the implications of its language are flatly at odds with the principles underlying the *Younger* abstention doctrine itself. It hardly demonstrates appropriate deference to the state court adjudication process protected by *Younger* to suggest the District Court first preclusively resolved the state law issue presented in count II of Mannheim's complaint and then left the federal constitutional issues presented in count I, but *only* those issues, to the state court for resolution. Just as a federal court will narrowly construe federal legislation, where possible, to avoid a constitutional question, *see generally Ashwander v. Tennesee Valley Authority*, 297 U.S. 288, 347 (1936)

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[6] The County apparently agrees that Mannheim may advance the claim which was contained in count I of the federal complaint in the state court proceeding. Mannheim, for its part, does not intend to advance the precise claim presented in count III of its federal complaint, since that argument is now apparently foreclosed by a summary disposition of an unrelated appeal. *Mannheim Books, Inc. v. County of Cook*, 109 S.Ct. 209 (1988). Mannheim does, however, intend to advance a similar though distinct claim in the state court, and it intends to advance the precise claim presented to the trial court in count II of the federal complaint as well as a related claim.

(Brandeis, J., concurring), so the Illinois courts will narrowly construe state and local legislation to avoid constitutional difficulties, *People v. Geever*, 122 Ill. 2d 313, 324, 522 N.E.2d 1200, 1205 (1988); *Gill v. Miller*, 94 Ill. 2d 52, 56, 445 N.E.2d 330, 332-33 (1983). The Court of Appeals' suggestions, however, would deprive the state court of the opportunity to construe the ordinance's definitions of "adult motion picture theater" and "adult mini motion picture theater" in order to avoid, for instance, a first amendment overbreadth challenge which Mannheim will present to those definitions. Whatever the state court ultimately decides, the federal courts under *Younger* must surely leave the state court free to resolve such state law issues on its own terms. Indeed, the Court of Appeals itself has previously recognized as much when it noted in passing that proper procedure under *Younger* requires that the trial court "dismiss the entire action . . ." *Moses v. County of Kenosha*, 826 F.2d 708 (7th Cir. 1987).

Since the Court of Appeals' language is likely, if left to stand without further comment or clarification, to confuse state courts when they adjudicate the cases left to them as a result of *Younger* abstention, this Court should clarify the proper scope of a *Younger* dismissal in order to make it clear that a federal trial court disposes of no claim on the merits when it abstains, but rather leaves all of the claims which can be litigated in the state court proceeding open for resolution there. This Court should therefore give its attention to this important matter which arises as the lower courts continue to apply the *Younger* abstention doctrine in the cases before them. *Cf.* S.Ct. Rule 10.1(c).

CONCLUSION

For all of the foregoing reasons, this Court should direct a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in order to determine the foregoing important general questions concerning the timing and scope of federal abstention under the *Younger* doctrine and to resolve the conflict among the federal courts of appeals concerning the waiver of abstention claims under that doctrine.

Respectfully submitted,

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March 14, 1990

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-3511 and 89-1060

MANNHEIM VIDEO, INC., an Illinois corporation,
Plaintiff-Appellant, Cross-Appellee,

v.

COUNTY OF COOK, a body politic and corporate,
Defendant-Appellee, Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 3805—**Prentice H. Marshall**, *Judge.*

ARGUED JUNE 12, 1989—DECIDED SEPTEMBER 20, 1989

Before BAUER, *Chief Judge*, and CUMMINGS and FLAUM, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Mannheim Video, Inc. appeals the decision of the district court to dismiss its lawsuit *sua sponte* in favor of a parallel state court action. The defendant County of Cook cross-appeals the district court's decision not to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure. We affirm the district court's decisions in both respects.

I. Procedural History

Mannheim Video ("Mannheim") operates a video arcade and gift shop within Cook County, Illinois. A portion, less

than half, of Mannheim's business is comprised of sexually explicit materials, including books, magazines and novelties. The Mannheim video arcade houses individual, coin-operated booths, which feature sexually explicit selections.

Mannheim initiated this lawsuit challenging the constitutionality of Cook County's zoning ordinance, Adult Use Provisions of the County's Zoning Ordinance, C.B. No. 107756 (1981). The zoning ordinance regulates establishments "having as a substantial or significant portion of its stock" materials that are sexually explicit in nature. The ordinance also includes particularized regulations for "adult mini motion picture theatres." Mannheim's three-count complaint sought declaratory and injunctive relief and alleged that: (1) the term "substantial or significant portion of its stock" is unconstitutionally vague; (2) its video viewing booths are not theatres within the definition of the zoning ordinance; and (3) the zoning ordinance otherwise impermissibly infringes upon Mannheim's First Amendment rights.

When Mannheim filed this suit in May 1988, it was already defending a state action brought by the County in April 1987. The state action alleged various infractions of the County's building ordinances. The state action did not allege any violations of the adult use zoning ordinance, presumably because *County of Cook v. Renaissance Arcade and Bookstore*, 122 Ill.2d 123 (1988), in which the Illinois Supreme Court upheld the constitutionality of certain parts of the adult use zoning ordinance, was then pending on appeal in the United States Supreme Court.

Cook County responded to Mannheim's complaint by moving to dismiss each of the three counts contained in the complaint for failing to state a claim upon which relief could be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Judge Marshall dismissed the second count, finding that Mannheim's video booths fell squarely within the ordinance's definition of a mini theatre. He stayed the third count pending the Supreme Court's disposition of *Renaissance Arcade*. Finally, Judge Marshall held that the

first count stated a valid claim under *Conley v. Gibson*, 355 U.S. 41, and he refused to dismiss that claim. Thus all that remained of Mannheim's suit was a single count alleging that the term "substantial and significant portion" was unconstitutionally vague.

On October 11, 1988, the Supreme Court summarily dismissed the appeal in *Renaissance Arcade*, sub nom. *Mannheim Books v. County of Cook*, 109 S.Ct. 209.[1] On October 27, 1988, the County amended its state court complaint against Mannheim, this time including allegations of violations of the adult use zoning ordinance. Besides answering the amended state court complaint and asserting a counterclaim similar to its complaint here, Mannheim moved the district court to enjoin the County from prosecuting the alleged violations of the adult use zoning ordinance in state court, and instead to compel the County to continue to contest the ordinance's validity in federal court. Upon learning that the state action now essentially included the same claim as that being asserted in federal court, Judge Marshall dismissed the federal action in favor of the state action, citing *Younger v. Harris*, 401 U.S. 37.

II. *Younger* Abstention

In *Younger v. Harris*, 401 U.S. 37, the Supreme Court held generally that principles of equity, comity and federalism require a federal court to abstain from hearing a federal action challenging the constitutionality of a state criminal statute while the state is prosecuting the federal plaintiff in state court for violating that same statute. *Id.* at 43-44. *Younger*, which involved a state criminal prosecution, has been applied to quasi-criminal actions as well. *Ciotti v. County of Cook*, 712 F.2d 312, 313 (7th Cir. 1983); see also *Trainor v. Hernandez*, 431 U.S. 434; *Juidice v.*

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[1] Mannheim Books bears no relation to the plaintiff in this case. The dismissal in *Mannheim Books* automatically resulted in the dismissal of the third count in the present complaint which had been stayed until then.

Vail, 430 U.S. 327; *Huffman v. Pursue, Ltd.*, 420 U.S. 592.

When the state proceedings follow the initiation of the federal action the district court should look to two factors before deciding whether to abstain. First, the court should consider whether the federal plaintiff will have an adequate opportunity to raise its constitutional challenges in the state proceedings. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423. Abstention certainly accomplishes nothing if the federal plaintiff cannot even raise its federal constitutional challenges in the state proceeding; it merely delays the inevitable federal action following the state proceeding and postpones the possible vindication of the federal plaintiff's constitutional rights. Second, the district judge must consider the progress of the federal action. The federal action should be dismissed in favor of the state action if there have been no "proceedings on the merits . . . in the federal court." *Hicks v. Miranda*, 422 U.S. 332; see also *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929 (abstention appropriate when federal action still in an embryonic stage); *Ciotti v. County of Cook*, 712 F.2d at 313-314; *State of Illinois v. General Electric Co.*, 683 F.2d 206, 212 (7th Cir. 1982).

Neither party contends that Mannheim would not have the opportunity to raise its constitutional challenges in the state action, so that only the second criterion under *Younger* is in dispute.[2] Mannheim argues that its federal action had progressed beyond an embryonic stage, see *Doran, supra*, and that substantial findings on the merits of its constitutional claim had been reached. We disagree.

Mannheim's contention is put to rest by this Court's previous decision in *Ciotti*, as Judge Marshall recognized. In *Ciotti* too, a bookstore challenged the constitutionality

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[2] Of course following an adverse decision in state court relating to its federal constitutional challenge, Mannheim could seek review in the Supreme Court of the United States.

of the Cook County adult use zoning ordinance. The County unsuccessfully moved to dismiss the case for want of a case or controversy, specifically arguing that the plaintiff lacked standing. The County then filed an action against the federal plaintiff in state court alleging violations of the ordinance. This Court affirmed the district judge's decision in that case to dismiss the federal action under *Younger* abstention grounds, noting that:

> The district court's decision that plaintiffs presented a case or controversy went to the issue of plaintiffs' standing, but it was not a decision relating to the merits of the underlying issue in the case—the constitutionality of the ordinance.

Ciotti, 712 F.2d at 314. Here too the merits of Mannheim's first count had not yet been decided.

Reasoning analogous to *Ciotti* applies to this case. Mannheim, however, contends that Judge Marshall's consideration of the County's motion to dismiss somehow "reached the merits of Mannheim's constitutional claims" (Br. 12). The federal action had yet to consider anything approaching the merits. All Judge Marshall decided was that the third count was directly dependent upon the Supreme Court's disposition of the *Renaissance* appeal, that the second count was too insubstantial to merit trial,[3] and that

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[3] Mannheim argues that Judge Marshall's rejection of its second count compelled him to retain and decide the remaining first count. This argument fails. A federal plaintiff cannot defeat abstention by tacking onto its complaint an insubstantial count (like the second count) that falls out well before trial. Judge Marshall's complete analysis of Mannheim's second count was simply:

> In Count II of its complaint, plaintiff claims that its individual viewing booths are not "theatres" as defined by the ordinance. This claim lacks merit. Plaintiff's booths fall squarely within the plain language of the definition of "adult mini motion picture theatres." Defendant's motion to dismiss is granted as to Count II.

(Footnote continued on following page)

the first count—the only viable count at the time of dismissal—merely satisfied the liberal standards of a complaint under Rule 12(b)(6). As for the only remaining viable issue, Judge Marshall's determination not to dismiss the first count merely meant the County was unable to show "beyond doubt that the plaintiff can prove no set of facts in support of his claim which could entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46.[4]

As in *Ciotti*, apart from the district court's decision on the County's motion to dismiss the second count, "the record indicates no other proceedings—for instance, depositions taken, discovery completed, or briefs filed on the issues—that would suggest advancement toward a determination on the merits. The federal proceeding was still in an embryonic stage." *Ciotti*, 712 F.2d at 314; see also citations therein.

III. Motion For Sanctions

The County also appeals Judge Marshall's refusal to award the County attorneys' fees as sanctions under Rule 11. The County argues that on two occasions attorneys Michael Null and Adam Bourgeois, counsel for Mannheim,

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[3] *continued*

When deciding on abstention, a federal court should not look simply at what issues are no longer a part of the case, but also what issues are left to decide and the progress of the court in deciding the remaining issues. Here only the first count remained and it was still in an early stage.

[4] The motion in *Ciotti* resembles the motion here to dismiss for failure to state a claim upon which relief can be granted. Although Mannheim seeks to distinguish the former as an issue of standing and the latter as touching upon the merits, both motions demand that the court determine whether a live case exists, a controversy that the judiciary can remedy. In *Ciotti*, the district court's analysis was limited to whether that plaintiff was a proper party to prosecute the suit. Here, Judge Marshall only determined whether a possible case with a legal remedy existed. Neither analysis casts any light or carries *res judicata* effects on the merits of a cognizable claim, here the first count.

failed to cite a relevant case which was adverse to their position. In both of the cases which Mannheim failed to cite, one or both of its present counsel were listed as attorneys of record. The County urges reversal based upon Judge Marshall's failure to engage in a thorough analysis as well as his ultimate decision not to impose sanctions.

In the first count of its complaint, Mannheim claimed that the term "substantial portion" as used in the ordinance can only be constitutionally interpreted to mean more than fifty percent. Later, in response to the County's motion to dismiss, Mannheim cited favorable state cases from Washington and California and federal district cases from Colorado and Michigan, but stated that "the precise constitutional question raised in the challenge presented here has not been squarely addressed by the Court" (R. Item 1 at 4). Mannheim's counsel failed to note that they had litigated and lost that exact issue in state court in *City of Chicago v. Scandia Books*, 102 Ill.App.3d 292 (1st Dist. 1981).

The second omission occurred when Mannheim filed its motion for a restraining order to enjoin the County from prosecuting the state action. Mannheim's accompanying memorandum of law failed to address or mention *Ciotti*, although one of Mannheim's attorneys of record at the time represented the plaintiff in *Ciotti*.

Judge Marshall felt that neither omission merited sanctions, and this Court reviews such decisions under a deferential standard. See *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (en banc). "[B]ecause the trial court alone has an intimate familiarity with the relevant proceedings, its decision whether counsel has conducted the kind of inquiry required by Rule 11 and taken a position reasonable in light of the facts and governing law is reversible only where there has been an abuse of discretion." *R.K. Harp Investment Corp. v. McQuade*, 825 F.2d 1101, 1103 (7th Cir. 1987).

We decline to hold that Judge Marshall's decision to forgo developing lengthy findings and pronounced analysis regarding attorneys' fees as sanctions was an abuse of

discretion. In *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1084 (7th Cir. 1987), this Court observed that a "serious Rule 11 motion is not a gnat to be brushed off with the back of the hand," and reversed the district court for failing to articulate any reasons for denying a motion for sanctions which was at least facially meritorious. But in that same case, we declined to adopt the requirement that district judges "make findings and give explanations every time a party seeks sanctions under Rule 11." *Id.* Rule 11 was designed in large part to curtail needless litigation and to uncork bottlenecks in the district courts. Requiring district judges to engage in time-consuming procedures every time a Rule 11 motion is made would create a cure that is as bad as the disease. On the record before us, the circumstances surrounding the County's motion are not so egregious as in *Szabo* that Judge Marshall's curt denial of the motion amounted to an abuse of discretion.

Although we decline to hold that Judge Marshall abused his discretion, this should in no way be interpreted as condoning the conduct of Mannheim's counsel. They argue that under our adversary system they are not required to make the County's argument. That may well be true, but the "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless." *Hill v. Norfolk and Western Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987), citing *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986). Mannheim's counsel argues that *Scandia* is not dispositive because it was an intermediate state court case interpreting a federal constitutional law, and therefore at best only persuasive in federal district court. That position is technically correct, but this argument is an exercise in gall when presented by the same attorney who argued in briefs that the district court should rule in his client's favor based upon intermediate California and Washington state court decisions, as well as decisions of federal district courts from outside this Circuit. And counsel's failure to cite *Ciotti* in his motion for a restraining order is also a poor example of an attorney conform-

ing to his duties as an officer of the court. Mannheim's counsel argues that it believes that *Ciotti* is not controlling. Aside from his being wrong, *Hill* and *Bonds* made clear that an attorney should not ignore potentially dispositive authorities; the word "potentially" deliberately included those cases arguably dispositive. Counsel is certainly under obligation to cite adverse cases which are ostensibly controlling and then may argue their merits or inapplicability. But counsel may not hide from virtually controlling cases, only later to argue that the omission was due to a scintilla of difference between the already decided cases and the one being litigated.

Since our review in this area is not *de novo*, the County had the burden of showing that Judge Marshall, who had a first-hand account of the events and was familiar with the surrounding context, abused his discretion by declining to impose sanctions. Regardless of our own displeasure with plaintiffs' counsel, the County failed to carry this burden.

IV. Conclusion

The district court was compelled to abstain from conducting further proceedings in light of *Younger*. Judge Marshall correctly dismissed the action, still in the embryonic stage of development, in favor of the parallel state proceeding. That state proceeding will afford Mannheim an adequate opportunity to press its federal constitutional claims, as well as preserve any possible appeal to a federal forum, if necessary. Furthermore, it has not been demonstrated that Judge Marshall's decision to decline sanctioning Mannheim under Rule 11 was an abuse of discretion.

The decisions of the district court are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 14, 1989

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

MANNHEIM VIDEO, INC., an Illinois corporation,
Plaintiff-Appellant, Cross-Appellee,

No. 88-3511
89-1060

vs.

COUNTY OF COOK, a body politic and corporate,
Defendant-Appellee, Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 3805—**Prentice H. Marshall,** *Judge.*

ORDER

On consideration of the petition for rehearing filed on October 11, 1989, by plaintiff-appellant, cross-appellee, and the answer of defendant-appellee, cross-appellant, all of the judges on the original panel having voted to deny the same.

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Mannheim Video

v

County of Cook Case Number: 88 C 3805

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that cause is dismissed on grounds of Younger abstention.

November 28, 1988 H. Stuart Cunningham, Clerk

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Judge Marshall
Case Number 88 C 3805 Nov. 27, 1988
Mannheim Video v. County of Cook

Judgment is entered as follows:

For the reasons stated in open court, plaintiff's motion for temporary restraining order is denied. On the Court's own motion, cause is dismissed on grounds of Younger abstention. Judgment to enter dismissing the action.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MANNHEIM VIDEO,

Plaintiff,

vs. No. 88 C 3805

COUNTY OF COOK,

Defendant.

TRANSCRIPT OF PROCEEDINGS
Monday, November 28, 1988
9:30 o'clock a.m.

BEFORE THE HONORABLE PRENTICE H. MARSHALL

APPEARANCES:

For the Plaintiff: Michael Null, Esq.
For the Defendant: Madeleine Murphy, Esq.

Official Court Reporter: Richard H. Dagdigian, C.S.R., 219 S. Dearborn St., Chicago, Illinois 60604, (312) 922-0033

THE CLERK: 88 C 3805, Mannheim Video versus County of Cook, for status.

MR. NULL: Michael Null for the plaintiff.

MS. MURPHY: Madeleine Murphy on behalf of Cook County.

THE COURT: I don't have an opinion for you, and I don't think you anticipated it because the briefs were just filed last week. In fact, I guess they were filed last Wednesday or something like that.

But I have concluded that I should deny the plaintiff's request for a restraining order.

And as I see the total posture of the case, I really think that the case should be dismissed under so called Younger abstention grounds.

First, with respect to the good faith of the defendant in prosecuting—or in amending the action in the State Court, as counsel for the defendant points out, certain aspects of the ordinance were not only pending here but they were pending before the Supreme Court of the United States.

And the amendments which have been made in the State Court proceeding were promptly made after the Supreme Court dismissed that appeal for want of substantial Federal question, which constituted an adjudication on the merits of the issues that had been before the Supreme Court of Illinois.

Secondly, as we have previously ruled, there is no pending case here as far as the mini-theaters are concerned. And there is no reason why the defendant should not be permitted to proceed to enforce that aspect of its ordinance against the plaintiff.

What's left is the constitutionality of the substantial—you would think I wouldn't forget it by now, but the substantial portion—

MR. NULL: I've submitted it.

THE COURT: Substantial or significant portion language of the ordinance.

The plaintiff's argument that we should enjoin or restrain prosecution of that portion of the ordinance has a substantial amount of merit, save for the existence of the Seventh Circuit authority in Ciotte, C-i-o-t-t-e, against County of Cook, in which the Court of Appeals for this Circuit held that a substantially filed action could con-

stitute grounds for—in fact, should constitute grounds for Younger abstention under the identical ordinance.

I think it would be a gross waste—there is just no grounds upon which to enjoin anything in the State Court other than the substantial or significant portion language, and I think that it would be inappropriate to have one portion of the ordinance as it affects the plaintiff here and another portion of the ordinance as it affects the plaintiff in the State Court.

It's in the exercise of judicial economy and in deference that we should say to State Courts on matters of this kind that the lawsuit proceed to trial in a single forum.

So for those reasons, I'm going to deny the motion to—for temporary restraining order, and I really think on my own motion, I should dismiss the case on Younger grounds, and you should be about your business in the State Court.

MR. NULL: Thank you, your Honor.

THE COURT: So that will be the order.

MS. MURPHY: Thank you.

THE COURT: The motion for temporary restraining order is denied. On the Court's own motion, cause dismissed on the grounds of Younger abstention.

(Proceedings concluded.)

CERTIFICATE

I HEREBY CERTIFY THAT the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

RICHARD H. DAGDIGIAN, Official Court Reporter
12/2/88.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Judge Marshall
Case Number 88 C 3805 September 20, 1988
Mannheim Video v. County of Cook

Other docket entry:

Defendant's motion to dismiss is denied as to Count I, granted as to Count II, and stayed as to Count III. Defendant is ordered to answer Count I within 14 days. Plaintiff's request for a declaration that "substantial or significant portion" be interpreted as "greater than 50%" is stricken. Cause held for trial as scheduled.

[Dated September 20, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MANNHEIM VIDEO, INC., an Illinois corporation,
Plaintiff,

vs. No. 88 C 3805

THE COUNTY OF COOK, a body politic and corporate,
Defendant.

MEMORANDUM ORDER

Prentice H. Marshall, District Judge

Plaintiff Mannheim Video challenges the application of defendant Cook County's zoning ordinance to plaintiff's gift shop and video arcade. Defendant has moved to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. We must accept plaintiff's alleged facts as true and deny dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Cook County's zoning ordinance, as amended in 1981 and construed by the Illinois Supreme Court in March of 1988, permits adult bookstores and theatres only in 78 industrial zones. The ordinance defines an "adult bookstore" as:

> an establishment having as a substantial or significant portion of its stock in trade, books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities'

> or 'Specified Anatomical Areas,' or an establishment with a segment or section devoted to the sale or display of such materials."

An "adult mini motion picture theatre" is defined as:

> an enclosed building with a capacity for less than 50 persons used for presenting materials distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' for observation by patrons therein."

Plaintiff operates a video arcade and gift shop in a zone in which adult uses are prohibited. A portion of plaintiff's goods are of the type described in the ordinance's definition of adult bookstore, although this material comprises less than half of plaintiff's stock. The arcade portion of the establishment has thirteen coin-operated booths for individual viewing of sexually explicit videos. Defendant has allegedly closed other similar businesses in plaintiff's zone as unlawful adult uses and has threatened to do the same with plaintiff's establishment.

Plaintiff brought this suit pursuant to 42 U.S.C. Sec. 1983 seeking injunctive and declaratory relief. It alleges that because of the vagueness of the term "substantial or significant portion" the ordinance cannot be constitutionally applied to businesses selling predominately non-adult material (Count I); that the video viewing booths are not "theatres" within the ordinance's (Count II); and that the restriction effectively bans adult uses in violation of the first amendment (Count III). We will address each claim in the order presented.

In Count I of its complaint, plaintiff alleges that the ordinance's definition of adult bookstore is unconstitutionally vague. Defendant argues that plaintiff lacks standing to assert this claim and that the language challenged

is constitutionally sufficient. For the reasons that follow, we reject both of defendant's arguments and deny its motion to dismiss Count I.

A plaintiff challenging a statute on constitutional grounds must show a real and immediate threat of direct harm; an imaginary or speculative fear of enforcement is not enough. However, "when the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.' " *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

Here, plaintiff alleges in its complaint and in its response to defendant's motion that several similar businesses in its zone have been prosecuted under this ordinance and also that the State's Attorney has on several occasions specifically threatened enforcement against the plaintiff. We hold that these facts, if proven, constitute a credible threat of prosecution under the challenged statute. See *Steffel v. Thompson*, 415 U.S. 452, 458-59 (1974) (prior warnings and police officer's threat to arrest if proscribed conduct continued held sufficient to impart standing).

Defendant argues that we should nonetheless dismiss for lack of standing because plaintiff has failed to allege any nexus between the allegedly vague portion of the statute and the prior closings or threats of enforcement. Specifically, defendant notes that plaintiff has failed to allege that the threat of closure results from the portion of the definition challenged (an establishment with a "substantial or significant portion" of adult material) rather than

the second half of the disjunctive (an establishment with a "segment or section devoted" to adult material).

Defendant has not cited any authority supporting this application of the standing doctrine and we are not persuaded that a nexus of this specificity is required, especially in a first amendment context. Plaintiff has been threatened with closure under the zoning ordinance and the challenged portion of the definition arguably applies. This is a sufficient threat to plaintiff's first amendment freedoms to support standing in federal court. Dismissal of plaintiff's vagueness claim for lack of standing is denied.

Defendant also challenges the merits of plaintiff's vagueness claim. In support of its position, defendant cites *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979). The ordinance challenged in *Hart*, however, defined adult establishments as those with a "preponderance" of adult material rather than a "substantial portion." We believe the difference in vagueness between these terms is constitutionally significant. Moreover, the court in *Hart* rejected the plaintiffs' vagueness claims at the outset because each plaintiff was clearly within the definition and therefore lacked standing to assert a vagueness challenge. 612 F.2d at 833. Here, plaintiff has alleged that adult material comprises less than a preponderance of its stock; its status under the challenged definition is unclear. *Hart* is therefore inconclusive as to the constitutionality of this statute as applied to this plaintiff.

At the district court level, the results are mixed. *Nortown Theatre Incorporated v. Gribbs*, 373 F. Supp. 363, 367 (E.D.Mi. 1974), *aff'd* on other grounds *sub nom. Young v. American Mini-Theatres*, 427 U.S. 50 (1976), and *15192 Thirteen Mile Rd. v. City of Warren*, 626 F. Supp. 803, 820-21 (E.D. Mi. 1984), held that "substantial or significant portion" is not unconstitutionally vague language.

Both cases relied for precedential support on decisions construing the term "substantial" in non-first amendment contexts. The court in *Pensack v. City and County of Denver*, 630 F. Supp. 177, 181 (D. Colo. 1986), on the other hand, concluded that this language, when applied to an establishment selling both adult and nonadult material, is "a denial of due process because there is no adequate notice to the plaintiff as to what is restricted, and there are no sufficient standards for law enforcement to avoid the chilling effect on speech that is the consequence of uncertainty."

We believe that the result in Pensack is more consistent with the standards controlling in this circuit. These standards are set forth in *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980):

> We insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms, it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

631 F.2d at 501 (citations omitted). The definition of adult book store challenged here, when applied to the type of mixed-fare bookstore that plaintiff claims to be, implicates each of the evils proscribed above. A bookstore offering

both adult and nonadult materials is left to speculate whether its adult materials comprise a "substantial or significant portion" of its stock. The potential for arbitrary enforcement is manifest, as the interpretation of these terms and enforcement of the ordinance is left to the discretion of county officials.[1] Finally, it is conceivable that many bookstore owners will be deterred from offering any adult material as a result of the ordinance's uncertain definition of adult bookstore.

Therefore, we hold that plaintiff has stated a cognizable claim for relief based on vagueness grounds and deny defendant's motion to dismiss Count I of the complaint. However, because we lack authority to cure defects in state statutes by construction, *Smith v. Goguen*, 415 U.S. 566, 575 (1974), plaintiff's request that we declare "substantial or significant portion" to be "greater than 50%" is stricken.

In Count II of its complaint, plaintiff claims that its individual viewing booths are not "theatres" as defined by the ordinance. This claim lacks merit. Plaintiff's booths fall squarely within the plain language of the definition of "adult mini motion picture theatres." Defendant's motion to dismiss is granted as to Count II.

---

[1] This is especially problematic in the present context. Zoning ordinances of this type withstand first amendment scrutiny only when they are aimed at the secondary effects of adult uses rather than sexual content itself. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986). Accordingly, the ordinance must be " 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects." *Id.* at 52. Delineating the scope of the ordinance with the term "substantial or significant portion" impermissibly delegates this tailoring to the discretion of county officials.

In Count III, plaintiff alleges that the ordinance fails to meet the minimum requirements for constitutional validity set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). That decision ruled that the regulation of adult uses is permissible so long as it "allows for reasonable alternative avenues of communication." *Id.* at 50. Plaintiff claims that the Cook County ordinance, by restricting adult uses to unsuitable industrial zones only, effectively denies any opportunity to sell adult material in unincorporated Cook County.

Defendant contends that this claim is foreclosed by the Illinois Supreme Court's rejection of an identical challenge to the same Cook County ordinance in *County of Cook v. Renaissance Arcade*, 122 Ill. 2d 123, 522 N.E.2d 73 (Ill. 1988). This argument fails, however, as plaintiff claims that it bears no relation to the parties in that suit. Plaintiff's challenge is therefore not precluded by the prior litigation in state court. *See E.B. Elliot Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1148-49 (5th Cir. 1970), *cert. denied*, 400 U.S. 805 (1970) (state court decision does not preclude challenge to ordinance in federal court by unrelated plaintiffs); *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (5th Cir. 1978) (identity of interests, claim, and attorney with parties in state court litigation insufficient to bind current plaintiff in federal court).

We also reject defendant's claim that this court is bound by stare decisis to follow the Illinois court's ruling regarding the ordinance's validity. The cases cited by defendant pertain to the interpretation of state law. Here, however, we consider the validity of the ordinance under the federal constitution. The state court opinion is thus of persuasive effect only. *See Zwickler v. Koota*, 389 U.S. 241, 251-52 (1967) ("the 'recognition of the role of state courts as the final expositors of state law implies no disregard for the

primacy of the federal judiciary in deciding questions of federal law' ").

Thus, we find neither of defendant's proffered grounds for dismissal of Count III persuasive. Nonetheless, we do believe that proceedings on this claim, and our ruling as to its legal sufficiency, should be stayed. The Illinois Supreme Court's ruling in *Renaissance* has been appealed to the United States Supreme Court. The resolution of that appeal *will* be binding on this court as to the sufficiency of plaintiff's claim. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Further, because plaintiff may proceed immediately with its vagueness claim in Count I, the delay in resolving Count III will not prejudice its rights. These considerations suggest that the interests of the court and those of the parties are best served by a stay on Count III pending resolution of appeal from *Renaissance*.

ORDER

Defendant's motion to dismiss is denied as to Count I, granted as to Count II, and stayed as to Count III. Defendant is ordered to answer Count I within 14 days. Plaintiff's request for a declaration that "substantial or significant portion" be interpreted as "greater than 50%" is stricken. Cause held for trial as scheduled.

ENTER: PRENTICE MARSHALL

DATED: September 20, 1988

89-1458

No. 89-1450

Supreme Court, U.S.
FILED
MAY 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MANNHEIM VIDEO, INC.,
an Illinois Corporation,

Petitioner,

v.

COUNTY OF COOK,
a body politic and corporate,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether Respondent Cook County promptly and correctly argued that the *Younger* abstention doctrine should be applied in favor of state proceedings initiated after the federal action was dismissed but before any proceedings on the merits had taken place in federal court.

Whether the Court of Appeals followed established precedent in finding that where the district court had simply denied in part and allowed in part respondent's motion to dismiss petitioner's complaint for failure to state a cause of action, the federal proceedings were still in an embryonic stage.

Whether petitioner's request that certiorari be granted in order to clarify the language of the opinion below is an attempt to present issues which have been waived by petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MANNHEIM VIDEO, INC.,
an Illinois Corporation,

Petitioner,

v.

COUNTY OF COOK,
a body politic and corporate,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the County of Cook, a body politic and corporate, respectfully requests that the Petition for Writ of Certiorari be denied.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit was rendered on September 20, 1990. Rehearing was denied on November 14, 1989. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 884 F.2d 1043 (7th Cir. 1989).

STATEMENT OF JURISDICTION

The jurisdiction of the Court is properly invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

No statutes or constitutional provisions are directly involved in this appeal.

STATEMENT OF THE CASE

On May 2, 1988, Petitioner, Mannheim Video, Inc. ("Mannheim")[1] filed a lawsuit in the Federal District Court for the Northern District of Illinois challenging the constitutionality of Cook County's Zoning Ordinance, Adult Use Provisions of the County's Zoning Ordinance, C.B. No. 107756 (1981). The ordinance regulates establishments "having as a substantial or significant portion of its stock . . ." materials that are sexually explicit in nature. The ordinance also contains regulations for "adult mini motion picture theaters."

[1] Mannheim operates a video arcade and gift shop within Cook County, Illinois. A portion of Mannheim's business is comprised of sexually explicit materials, including books, magazines and novelties. The Mannheim Video arcade consists of thirteen coin operated booths featuring sexually explicit selections.

Mannheim's complaint which contained three counts sought declaratory and injunctive relief. The first count alleged that the term "substantial or significant portion of its stock" was unconstitutionally vague. The second count alleged that Mannheim's video viewing booths were not theaters within the definition of the ordinance and the third count alleged that the zoning ordinance otherwise impermissively infringed upon Mannheim's First Amendment rights.

At the time Mannheim filed its federal suit, it was already defending a state court action brought by Cook County in 1987 alleging various infractions of the County's building ordinance. The state action against Mannheim did not allege any violations of the adult use zoning ordinance because the case of *County of Cook v. Renaissance Arcade and Bookstore*, 122 Ill.2d 123 (1988) in which the Illinois Supreme Court struck down a first amendment challenge to certain portions of the adult use zoning ordinance was then pending on appeal in this Honorable Court. Cook County was waiting to see the outcome of that case before proceeding to enforce the adult use provisions of the ordinance.

Cook County responded to Mannheim's federal complaint by filing a motion to dismiss each of the three counts pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court dismissed Count II finding that "Plaintiff's booths fall squarely within the plain language of the definition of adult mini motion picture theaters." The district court stayed its ruling on Count III, noting "the Illinois Supreme Court's ruling in *Renaissance* has been appealed to the United States Supreme Court. The resolution of that appeal will be binding on this Court as to the sufficiency of plaintiff's claim." Finally, the district court held that the first count involving a vagueness claim concern-

ing the term "substantial or significant" stated a valid claim under *Conley v. Gibson*, 355 U.S. 41 (1957) and refused to dismiss that claim.[2]

On October 11, 1988, this Court dismissed the *Renaissance* appeal sub. nom. *Mannheim Books, Inc. v. County of Cook*, 109 S.Ct. 209-10 (1988) and Count III of Mannheim's Complaint was therefore dismissed. On October 27, 1988, after this Court dismissed the *Renaissance* appeal, Cook County now assured that it had a valid, enforceable adult use ordinance, amended its state court complaint against Mannheim, seeking enforcement proceedings against Mannheim under the adult use zoning ordinance. Mannheim answered the amended state court complaint and asserted a counterclaim raising three counts similar to Mannheim's complaint in the federal district court. Mannheim also filed a motion for preliminary injunction and a temporary restraining order in the federal district court in an attempt to enjoin the County from prosecuting the alleged violations of the adult use zoning ordinance in state court and to compel the County to continue to contest the validity of the ordinance in federal court. Cook County argued that the federal court should not consider plaintiff's complaint on the basis of *Younger* abstention grounds. Thereafter, the district court dismissed the case on the grounds of *Younger* abstention.

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[2] In its response to Cook County's motion to dismiss the attorneys for Mannheim failed to apprise the district court that they had litigated and lost this same issue in the Illinois courts in the case of *City of Chicago v. Scandia Books*, 102 Ill.App.3d 292 (1st Dist. 1981). The attorneys for Mannheim were sharply criticized by the court of appeals in the case below who found that such "ostrich-like" tactics were "an exercise in gall." 884 F.2d at 1046, 1047.

Mannheim appealed the district court's decision to dismiss the suit on the basis of *Younger* arguing that the federal action had progressed beyond an embryonic stage and that substantial findings on the merits of its constitutional claims had been reached. The Court of Appeals for the Seventh Circuit affirmed the district court's decision to dismiss Mannheim's suit *sua sponte* in favor of a parallel state court action.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

RESPONDENT COOK COUNTY PROMPTLY AND CORRECTLY ARGUED THAT THE *YOUNGER* ABSTENTION SHOULD BE APPLIED IN FAVOR OF STATE PROCEEDINGS WHICH WERE INITIATED AFTER THE FEDERAL ACTION WAS FILED, BUT BEFORE ANY PROCEEDINGS ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT.

Petitioner contends first that Respondent, County of Cook, waived its right to *Younger* abstention by allegedly ". . . failing to insist upon such an abstention before presenting its contentions in the federal court." (Petition at 11) Respondent maintains that the *Younger* abstention argument was raised at the earliest appropriate time and the waiver argument now raised by Petitioner is based on a mischaracterization of the facts and law pertaining to the circumstances involved in this case. Therefore, the petition for writ of certiorari should be denied.

In an attempt to convince this Honorable Court that this case warrants the exercise of its extraordinary and

discretionary jurisdiction, Petitioner alleges there is a conflict among circuits concerning the waiver rules which some circuits apply under the *Younger* doctrine. (Petition at 12) However, the allegedly conflicting decisions relied upon by Petitioner are patently distinguishable on the basis of their facts. Furthermore, the facts in this case establish that the County of Cook promptly and correctly raised abstention at the earliest possible time in the district court when parallel state proceedings were initiated and before any proceedings on the merits had taken place in the federal action. Thus, no waiver of the abstention argument occurred.

This Court held in *Hicks v. Miranda*, 422 U.S. 332, 350 (1975) that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any substantial proceedings on the merits have taken place in the federal court the principles of *Younger v. Harris*, 404 U.S. 37 (1971), should apply in full force." *See also, Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). Here, when petitioner filed this suit in the instant case in May, 1988 in federal court it was already defending a state action brought by the County of Cook in April, 1987. The state action alleged various infractions of the Cook County building ordinances, but did not and could not allege any violations of the adult use zoning ordinances, because *County of Cook v. Renaissance Arcade and Bookstore*, 122 Ill.2d 123 (1988) in which the constitutionality of certain parts of the adult zoning ordinance had been challenged was pending on appeal in this Court.

Since no parallel state action existed at the time Petitioner filed its federal court action, County of Cook could not raise abstention as a basis for dismissing the federal

suit. In accordance with the Federal Rules of Civil Procedure, Cook County responded to Petitioner's complaint by moving to dismiss each of the three counts contained in the complaint for failing to state a claim upon which relief could be granted pursuant to Rule 12(b)(6). In ruling on the motion, the district court dismissed the second count, finding that Petitioner's video booths fell squarely within the ordinance definition of a "mini theater" and stayed the third count pending this Court's disposition of the appeal in *Renaissance Arcade*. Finally, the district court held that the first count stated a valid claim under *Conley v. Gibson*, 355 U.S. 41 (1957).

On October 11, 1988, this Court summarily dismissed the appeal in *Renaissance Arcade*, sub. nom. *Mannheim Books v. County of Cook*, 109 S.Ct. 209 (1988). On October 27, 1988, Cook County, on the basis that the Cook County ordinance had now been upheld by this Court amended its pending state complaint against Petitioner to include violations of the adult use zoning ordinance. Petitioner answered the state court complaint and asserted a counterclaim similar to its claims pending in federal court. Petitioner also moved the district court to enjoin the County from prosecuting the violations of the adult use zoning ordinance in state court and to compel the County to continue to contest the constitutionality of the ordinance in federal court.

In response to Mannheim's motion, Cook County argued abstention. The district court agreed that abstention was appropriate in that the state action now essentially included the same claim as was being asserted in federal court and dismissed the federal action in favor of the state action, citing *Younger v. Harris*, 401 U.S. 37 (1971). The district court also found that the County's decision to wait

for this Court's ruling on the *Renaissance* appeal prior to initiating any further litigation under the adult use provisions was done in good faith.

It is clear that Cook County's decision not to file claims under the adult use ordinance while it was under consideration by the United States Supreme Court was entirely appropriate, and cannot be characterized as "forum shopping." Despite Petitioner's claim to the contrary, the instant case does not involve a situation wherein the County of Cook voluntarily choose to submit to a federal forum and then sought abstention when it feared an adverse ruling by the federal court. Petitioner's unfounded accusations are an example of Petitioner's manipulation of the facts and law to suit its own purposes which have occurred throughout this case in the courts below.

For example, Petitioner conveniently fails to point out that it was Petitioner who filed suit in federal court and chose the federal forum to raise its constitutional challenge to the County ordinance. Moreover, it is now apparent that Petitioner did so knowing that the constitutional challenges which petitioner now claims would have been decided in its favor by the district court had previously been rejected in state court. *See, City of Chicago v. Scandia Books*, 102 Ill.App.3d 292 (1st Dist. 1981) Petitioner nevertheless failed to direct the district court's attention to this state authority. Thus, it was petitioner, not respondent who chose the federal forum in order to avoid the consequences of the state authority contrary to its position.

Furthermore, the case law cited by Petitioner in support of its waiver argument is inapposite to the fact situation in the case at bar. Thus, this case does not involve a conflict among circuits which needs to be addressed by this Court.

For example, in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), plaintiff Hodry sued the Bureau of Employment services in federal court, seeking declaratory relief from an Ohio Benefit statute. The case went to trial before a three-judge court and the Bureau argued abstention for the first time at trial. In this case, Respondent Cook County raised abstention at the first opportunity after state court proceedings had been instituted, long before any trial was anticipated. *Hodory* is thus clearly distinguishable from this case, since that case actually proceeded to trial on the merits.

In *Association of Community Organizations for Reform Inc. v. Municipality of Golden*, 744 F.2d 739 (10th Cir. 1984), the Court of Appeals for the Tenth Circuit noted that although the *Younger* abstention doctrine could have applied to one of the named defendants, the government's decision to stay the criminal action pending against that defendant and to proceed in the federal court to trial effectively waived the *Younger* abstention. In the instant case, the County never sought to stay the state court action but amended the state court action to include the counts alleging violation of the County Adult Use Ordinance at the earliest appropriate time after this Court's decision in *Renaissance*. In *ACORN v. Municipality of Golden*, *Id.* the case proceeded to trial and the issue of abstention which was never raised by any of the parties was addressed in *dicta* in a footnote by the Court of Appeals. This *dicta* obviously has no applicability to the instant case in which the Court of Appeals for the Seventh Circuit affirmed the district court's *Younger* abstention where it was raised as soon as parallel state proceedings were initiated and while the federal proceedings were still in an "embryonic stage." *Mannheim Video Inc.*, 884 F.2d at 1046.

Likewise, Petitioner's citation of *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978), *aff'd*, 445 U.S. 308 (1980) does not support its argument that the County's *Younger* argument was waived. In *Vance*, the three judge district court found *Younger* inapplicable because no prosecution either criminal or civil was pending at the time the case proceeded to a hearing on the merits. On appeal, the *Younger* abstention issue was not even raised and in *dicta* in a footnote the Court of Appeals for the Fifth Circuit simply commented that the issue of a *Younger* abstention was not jurisdictional and was therefore not reviewable. The Court also noted there were no parallel state proceedings pending when suit was brought. Universal is totally unlike the instant case, wherein a parallel pending court proceeding was amended after the initiation of the federal action, but before any proceedings on the merits of the case had taken place.

Clearly, none of the cases relied upon by Petitioner demonstrate that a conflict exists between the circuits. Moreover, the cases cited all involve situations unlike the instant case. The Court of Appeals followed established precedent set forth by this Honorable Court and is consistent with other circuits in finding that the district court properly abstained in favor or a parallel state action. Petitioner's waiver argument which is without basis in either fact or law is clearly meritless. Therefore, certiorari should be denied.

II.

THE COURT OF APPEALS FOLLOWED ESTABLISHED PRECEDENT IN FINDING THAT WHERE THE DISTRICT COURT HAD SIMPLY DENIED IN PART AND ALLOWED IN PART, RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION THE FEDERAL PROCEEDINGS WERE STILL IN AN EMBRYONIC STAGE.

Petitioner next argues that the court below erred in finding that the District Court proceedings remained in an "embryonic stage." According to Petitioner, the district court's denial of the motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should have been construed as a substantial proceeding of substance on the merits.

Respondent maintains that the Court of Appeals for the Seventh Circuit correctly applied the facts in this case to the well-established law governing abstention when it determined that "the federal proceeding was still in an embryonic stage," at the time the case was dismissed in favor of the parallel state proceeding.

Petitioner does not attack the soundness of the Seventh Circuit's legal reasoning. Nor does it dispute the well-established law which provides that in a case where state proceedings follow initiation of a federal action, the federal action should be dismissed in favor of the state action if there have been no substantial proceedings on the merits or the federal action is in an "embryonic stage." *Hicks v. Miranda*, 422 U.S. 322; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 929; *Ciotti v. County of Cook*, 712 F.2d 312, 313-314; *State of Illinois v. General Electric Co.*, 683 F.2d 206, 212 (7th Cir. 1972).

Petitioner argues only that the Seventh Circuit should have concluded that the district court's denial of Cook

County's Motion to Dismiss as to Count I of its complaint amounted to a substantial proceeding on the merits. The Seventh Circuit in rejecting this argument relied on the case of *Ciotti v. Cook County*, 712 F.2d 312 (7th Cir. 1983) and found that the denial of the County's 12(b)(6) motion as to Petitioner's only viable Count in his Complaint (Count I) was not a substantial proceeding on the merits, but simply a determination that the County was unable to show "beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Mannheim Video, Inc.*, 844 F.2d at citing, *Conley v. Gibson*, 355 U.S. 41 (1957). The Court therefore concluded:

> As in *Ciotti*, apart from the district court's decision on the County's motion to dismiss the second count, "the record indicates no other proceedings—for instance, depositions taken, discovery completed, or briefs filed on the issues—that would suggest advancement toward a determination of the merits. The federal proceeding was still in an embryonic stage." *Ciotti*, 712 F.2d at 314; see also citations therein. *Mannheim Video, Inc.*, 884 F.2d at 1045-1046.

Although Petitioner cites a plethora of case law on the doctrine of abstention, it does not cite a single case which supports its position that the denial of the motion to dismiss Count I constituted a substantial proceeding on the merits. Its wealth of cited case law nowhere criticizes the *Ciotti* decision, finds inconsistently with it, or distinguishes it. To the contrary, the decision of the court below followed established precedent and accurately and correctly applied that law to the facts of this case. Therefore, Petitioner's attempt to gain certiorari on this issue must fail.

III.

PETITIONER'S REQUEST THAT CERTIORARI BE GRANTED IN ORDER TO CLARIFY THE LANGUAGE OF THE OPINION OF THE COURT BELOW IS AN ATTEMPT TO PRESENT ISSUES WHICH HAVE BEEN WAIVED IN THE COURTS BELOW BY PETITIONER.

Petitioner lastly contends that this Court should grant certiorari in this case to clarify the language of the decision of the court below, which it speculates could cause confusion as to the scope of the *Younger* abstention in the instant case. Respondent maintains that Petitioner's argument is not only speculative, but is an attempt to raise issues which have not been properly preserved for review and to thereby avoid the consequences of Petitioner's own failure to act.

The district court dismissed Counts II and III of petitioner's complaint for failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6). Thereafter, the district court abstained from deciding Count I of Petitioner's complaint on the basis of *Younger*.

Petitioner never sought to amend his complaint or to otherwise challenge or seek a clarification of the district court's ruling on the dismissals of Counts II and III before filing its notice of appeal. Instead, Petitioner proceeded to file its notice of appeal and briefs in this matter in the Seventh Circuit challenging only the propriety of the abstention on Count I. Petitioner waited until after the Seventh Circuit rendered its opinion and then filed a petition for rehearing in which he claimed the language of the opinion of the Seventh Circuit was confusing as to its possible *res judicata* effects regarding Counts II and III of its complaint.

Petitioner now admits that it will be able to raise Count I in the state court and concedes that this Court's ruling in *Renaissance Arcade*, 109 S.Ct. 209 (1988) precludes it from raising Count III. (Petition at 23) However, petitioner submits that because the state court could conclude that it is barred by *res judicata* from raising Count II due to the district court's dismissal of that claim or that any "similar but distinct" claims it may seek to raise may also be barred, the language of the court below should be clarified.

Though not appealable at the time the district court dismissed Counts II and III, the dismissal of Counts II and III became final and appealable once Petitioner filed its notice of appeal on Count I. With any complaint containing multiple counts the disposition of one is not a final judgment and is not appealable unless the district court certifies it for a direct appeal. *Universal Life Insurance Co. v. Unimarc*, 699 F.2d 846 (7th Cir. 1983). However, an appeal from a final judgment brings up all antecedent issues and a collateral order may be appealed at the end of the case. *Matters of Kilgus*, 811 F.2d 1112 (7th Cir. 1987).

It is clear therefore that Petitioner should have appealed the dismissal of Count II and III at the time he appealed the Court's dismissal on abstention grounds of Count I. Petitioner's failure to do so in a timely manner clearly serves as a waiver of this matter. *Bailey v. Bicknell Minerals*, 819 F.2d 690 (7th Cir. 1987). Moreover, since a final judgment has been entered and no appeal taken, Appellant may now be precluded by *res judicata* from relitigating Counts II and III of his complaint in state court. *See*, Generally, *Restatement of Judgments*, 1981, §87, *Federal Practice and Procedure*, 1981, Wright, Miller, Cooper

§4468, *Cannon v. Loyola University of Chicago*, 784 F.2d 777 (7th Cir. 1986).

This Court will not ordinarily decide questions not raised or resolved in the court below. *Youkaim v. Miller*, 425 U.S. 231, 234 (1976). Additionally, Plaintiff's manipulations of the Federal Rules of Civil Procedure to relitigate in state court issues that have been finally resolved do not justify a grant of certiorari. Furthermore, Petitioner's speculation as to whether or not it will be able to raise what it claims to be related but similar issues is clearly a matter to be resolved by the state court. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

Respondent, the People of the State of Illinois, respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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